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In the Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 125 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 725 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.[1]

As part of the regular product-design process, PLAC's members must routinely analyze and resolve questions about safety. PLAC members who manufacture products with the potential to cause significant physical injury or death—including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power tools, and automobiles—

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

have a particular interest in the legal implications of product-design decisions.

By upholding punitive liability against a manufacturer without regard to objective indicators of reasonableness—*e.g.*, whether its design decisions conformed with industry custom, met government safety standards, or were supported by contemporaneous expert opinion—the California courts embraced a regime of post hoc second guessing under which manufacturers can never know in advance whether their design decisions will subject them to punishment. Such an approach not only deprives manufacturers of "fair notice * * * of the conduct that will subject [them] to punishment" (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)), but also "'mak[es] the law so arbitrary that [manufacturers] will be unable to avoid punishment based solely upon bias or whim'" (*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting))).

Moreover, in this era of expansive tort litigation against corporations and even entire industries, PLAC's members are required to defend against product-liability lawsuits seeking millions and sometimes billions of dollars in jury-imposed punitive damages. It has been PLAC's experience that, in such cases, the lower courts routinely have been misapplying and, indeed, effectively nullifying the three excessiveness guideposts identified by this Court in *BMW* and refined in *State Farm*. This Court's guidance as to the proper application of the *BMW/State Farm* guideposts in the product-liability context is desperately needed. In particular, the lower courts are misapplying the reprehensibility guidepost in the product-liability context. With few exceptions, reviewing courts in products cases have mechanically applied the five non-exclusive reprehensibility criteria identified in *State Farm* in a way that makes a finding that the conduct is highly reprehensible a virtual foregone conclusion. That surely is not what this Court intended when it articulated its

guideposts and when it thereafter provided lower courts with a list of factors to consider in gauging reprehensibility. The present case well illustrates the problem and would be an ideal vehicle for providing the lower courts with the necessary guidance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last sixteen years, this Court has addressed issues relating to the administration of punitive damages in seven cases—*Haslip*, *supra*; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *BMW*, *supra*; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm*, *supra*; and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). In none of these cases, however, did the Court have occasion to evaluate a punitive award for excessiveness in the context of a product-liability claim. As a consequence, lower courts have lacked adequate guidance as to the proper application of the *BMW* guideposts in the product-liability context. Left to their own devices, they often have misapplied or refused outright to apply the guideposts, essentially on the ground that death (or serious personal injury) caused by an "intentionally" designed product is uniquely reprehensible.

Ironically, there is no other context in which it is more important to ensure that punitive damages are not applied arbitrarily and, when applied, do not exceed society's interest in rational deterrence. Products are the lifeblood of the American economy. Multimillion-dollar punitive awards rendered against manufacturers who have made good-faith design decisions and whose products meet and even exceed federal safety standards not only deprive product manufacturers of property without fair notice but have the inevitable effect of chilling innovation, encouraging excessive precautions, and increasing the price of products beyond the means of many potential purchasers.

PLAC submits, therefore, that it is vitally important for the Court to grant review in a product-liability case to supply needed guidance as to the proper excessiveness inquiry in this context. In the event that the Court does not vacate and remand for further consideration in light of *Philip Morris*, this case is an ideal vehicle for explaining the criteria that should be considered in assessing the reprehensibility of product-design decisions that later have been determined by a jury to have resulted in a defective product.

It also presents the Court with an opportunity to address, for the first time, the limitations that the Due Process Clause imposes on the adjudication of punitive liability, not just the amount of punitive damages.

ARGUMENT

It has become increasingly common that when a plaintiff is tragically injured or killed and a jury determines that a product is defective it also finds that the manufacturer acted reprehensibly and awards the injured plaintiff not just full compensation for her injuries (compensation that often includes a large punitive element in the form of increasingly large non-economic damages) but also an astounding windfall in punitive damages.

These penalties have ranged from a $4.8 billion punitive award (reduced by the trial court to $1.09 billion) in a case alleging that General Motors defectively designed its gas tanks by placing them behind instead of above the rear axle to the $246 million punitive verdict in this case (reduced by the courts below to $55 million) to $12.5 million for the alleged defective design of a seatbelt that had never failed in over twenty years to a $1 million penalty in the case of a fishbowl that shattered while being carried.

It is particularly disturbing that courts have allowed punitive verdicts to stand in many cases (including this one), despite compelling evidence that the product's design was objectively reasonable, simply because the manufacturer

knew that its product posed a risk of injury to consumers. For inherently dangerous products, however, such knowledge is not a sign of conduct that must be punished and deterred, but of the socially responsible cost-benefit calculus that we expect manufacturers to employ when making design decisions.

Moreover, it defies common sense to suggest that every product-liability case in which there is sufficient evidence to support some amount of punitive damages is one in which a penalty of millions or tens of millions of dollars is required to serve society's interest in punishment and deterrence. See *BMW*, 517 U.S. at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award.").

I. The Court Should Grant Review To Confirm That The Due Process Clause Prohibits States From Imposing Punitive Damages On A Product Manufacturer In The Absence Of Objective Criteria For Evaluating The Manufacturer's Conduct.

This Court repeatedly has stated that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice … of the severity of the penalty that a State may impose'" and "threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Philip Morris*, 127 S. Ct. at 1062 (citing *BMW* and *State Farm*). Accordingly, "this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Ibid.* By the same logic, a State that fails to appropriately cabin the jury's discretion deprives a defendant of fair notice of the conduct that will expose the defendant to punitive liability in the first place.

The imposition of punitive liability without adequate notice, just like the imposition of an overly large punitive award without adequate notice, is a violation of the defendant's due process rights. *BMW*, 517 U.S. at 574 ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment"); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966) ("a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits"). Indeed, regardless of the size of the award, the imposition of punitive liability alone can have significant negative effects on a defendant. That is particularly true in the product-liability context where an award of punitive damages can give rise to "'indirect' costs that manufacturers appear to take very seriously, such as publicity about litigation that may damage the company's reputation or trigger additional lawsuits, reactions of consumers that could reduce product demand, and reactions of safety regulators such as investigations, product recalls, or stricter regulations." Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution?*, 52 STAN. L. REV. 1809, 1814 (2000); see also *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards."); *Masaki v. General Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989) (punitive damages "can stigmatize the defendant in much the same way as a criminal conviction" and therefore "can be onerous when loosely assessed").

Because the imposition of punitive liability can be so harmful for a manufacturer and because the design and manufacture of products play such a critical role in the health

of our national economy, it is particularly important that the law provide clear guidance to manufacturers on how they are to design their products so as to avoid these sanctions. It is ironic, then, that the law provides almost no guidance in this context and allows the imposition of punitive liability based on the most arbitrary and post hoc considerations. This case, in which the reviewing court allowed the punitive verdict to stand despite the presence of several objective indicia of the reasonableness of Ford's design decision, provides a perfect opportunity for this Court to take up these issues.

Any rational punitive damages regime must begin with the fact that no product is completely safe. Neither are manufacturers required to design the safest product possible. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 cmt. a (1998) ("Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved."). Instead, the process of product design necessarily involves complex cost-benefit decisions. When deciding whether to implement a particular design feature, a manufacturer must consider many factors: the types of risks that the feature guards against (including their severity and likelihood); the feature's relative effectiveness at avoiding those risks as compared to alternative features; any risks that the feature might create or exacerbate (including their severity and likelihood); the relative benefits and costs of the feature with respect to other design considerations such as performance, efficiency, marketability, appearance, ease of operation, durability, freedom from maintenance or repair, and ease of manufacture; and, finally, the relative cost to consumers of the feature and its alternatives. The task of a

responsible manufacturer is to strike a reasonable balance between these often countervailing considerations.[2]

A manufacturer that conducts this cost-benefit calculus for an inherently dangerous product always can be charged with "knowingly" designing a product that poses certain risks to consumers. Indeed, the more transparent and comprehensive the manufacturer's analysis, the more that the manufacturer opens itself up to such charges. And when trying to strike an appropriate balance in the design of a complex, inherently dangerous product such as an automobile, a manufacturer inevitably confronts disagreement among experts about the benefits and relative costs of proposed safety features. In such contexts, the manufacturer is forced to make a decision with imperfect, often conflicting information.

This cost-benefit analysis, and the sometimes controversial design decisions that it entails, is an unavoidable component of the product-design process. Thus, when a manufacturer's "knowledge" that its product poses risks to consumers or its choice between competing opinions about a particular safety feature (*i.e.*, its "rejection" of some experts' opinions) is sufficient to sustain a punitive award—as has become true in an increasing number of product-liability cases—the law effectively provides no guidance on how a manufacturer can avoid such liability. If the law is to give manufacturers an opportunity to design their products so as to avoid punitive damages, then punitive liability must take account of other factors such as whether the product meets government safety standards, complies with industry custom, and contains de-

[2] The situation is different when a particular design violates a governing safety standard, such as a federal regulation. But in most product-liability cases where punitive damages are imposed, including this one, there is no claim that the manufacturer violated a statutory or regulatory design or performance standard. On the contrary, breathtaking punitive awards are regularly imposed for products that satisfy extensive and detailed government regulations.

sign elements that are endorsed by contemporaneous expert opinion at the time of the design.

Some courts already recognize the necessity for such criteria. In particular, many courts have recognized that punitive liability is inappropriate in situations where the manufacturer has made a design decision that was supported by contemporaneous expert opinion, even though the manufacturer "knew" that other experts thought that their design created an unreasonable risk of injury.[3]

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[3] See, *e.g.*, *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (concluding that, where there was reasonable disagreement among experts about adequacy of product design and testing, rational jury could not find defendant liable for punitive damages even though it could reasonably find liability on plaintiff's underlying tort claims); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (reversing punitive award in part because there was a good-faith disagreement among metallurgical experts regarding the safety of the material used in making the gun barrel that exploded, causing plaintiff's injury); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (affirming j.n.o.v. on punitive damages because "an award of punitive damages is inappropriate where room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"); *Owens-Corning Fiberglas Corp. v. Garrett*, 682 A.2d 1143, 1163-1165, 1167-1168 (Md. 1996) (reversing punitive award in part because there was a genuine scientific dispute regarding the safety of the product at issue); *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award in part because "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (reversing denial of j.n.o.v. because "[a]n award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue"); see generally David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 38 (1982).

Nevertheless, the court below rejected reliance on contemporaneous expert opinion as a factor to be considered when deciding whether a punitive verdict can stand.[4] Pet. App. 44a-46a. Similarly, it refused to consider compliance with government safety standards and industry custom and practice as relevant factors. Pet. App. 46a-50a. The resulting punitive damages regime is one in which product manufacturers have no means of ensuring that their design decisions do not expose them to liability for punitive damages.

In other words, even when a manufacturer has adopted a product design that is recommended by contemporaneous expert opinion, that meets or exceeds all government safety standards, and that performs as well as or better than other similar products on the market, the threat of an enormous punitive exaction still will hang over the manufacturer's head. In that situation, the criteria that determine whether the manufacturer is subjected to punitive liability in a particular case have nothing to do with the actual objective reasonableness of the manufacturer's design. Punitive liability instead turns on arbitrary factors such as whether this plaintiff is more sympathetic than the last eleven to bring similar claims or whether this plaintiff's lawyer has learned the lesson of the last eleven cases and finally perfected the right rhetorical tactic to incite a jury to outrage over the product at issue.

This Court's guidance on the appropriate criteria to be considered before imposing punitive liability in the product-liability context is urgently required to give manufacturers fair notice of how they may design products responsibly

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[4] The court seemed to misunderstand the nature of the argument being made, construing it as an attempt to avoid liability any time that a defendant puts on expert testimony at trial that its design was reasonable. On the contrary, the point has nothing to do with the *ex post* analysis offered by experts at trial, but addresses the situation that confronts a manufacturer when there is a genuine dispute among experts at the time that design decisions are being made.

without risking the stigmatizing burden of punitive liability and the debilitating costs of exorbitant punitive awards.

II. The Court Should Grant Review In Order To Provide Necessary Guidance On The Proper Application Of The *BMW/State Farm* Guideposts In Product-Liability Cases.

In addition to presenting squarely the punitive liability issue, the present case would be an ideal vehicle for providing the lower courts with needed guidance on the proper application of the *BMW/State Farm* guideposts in the product-liability context. Although the lower courts have consistently misapplied the ratio and comparable-penalties guideposts in product cases (ignoring this Court's guidance about a 1:1 ratio often being the constitutional maximum when compensatory damages are "substantial" and either ignoring or giving minimal weight to the relevant NHTSA and CPSA fines), we focus here on the pressing need for guidance about the reprehensibility guidepost.

The degree of reprehensibility of the defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. But it also is the guidepost that is most susceptible to misapplication in a product-liability action. The linchpin of this guidepost is "the accepted view that some wrongs are more blameworthy than others." *Ibid.* Accordingly, when analyzing a punitive award for excessiveness, a reviewing court must locate the defendant's conduct on a spectrum of reprehensibility, with a "high degree of culpability" being necessary to sustain "a substantial punitive damages award" (*id.* at 580).

But reviewing courts have gone astray in the product-liability context, treating all product-liability cases as if they fall on the high end of the reprehensibility spectrum merely because they involve physical harm, the design decisions at issue are "intentional" rather than "accidental," and the jury

necessarily found reckless disregard for safety as part of its threshold decision to impose punitive liability In other words, three of the five reprehensibility factors identified in *State Farm* are treated as present automatically in all product-liability cases in which punitive damages are imposed.[5] This systematic bias, which has resulted in eye-popping exactions regularly being upheld in product-liability cases, is an unfortunate result of the fact that this Court's guidance on applying the reprehensibility guidepost has come exclusively in the context of traditional economic torts.

Product-liability claims are unique in many ways. Unlike most other classes of torts, product-liability claims involve physical injuries or death as a matter of course. Moreover, although companies that design and manufacture products are the heart of the American economy, when a jury looks through the virtually inescapable lens of hindsight at a tragically injured plaintiff on the one hand and a large corporate defendant on the other, it easily is provoked to a state of outrage that leads it to award astounding sums in punitive damages irrespective of the true culpability of the manufacturer's conduct or the actual need for punishment and deterrence. As Judge Easterbrook has explained:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. * * *

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[5] In addition, several courts have held that the other two factors are met too because the plaintiff invariably is financially vulnerable vis-à-vis the defendant manufacturer and the design decision necessarily results in thousands of consumers being exposed to the same alleged defect. See, *e.g.*, *Udac* v. *Takata Corp.*, Civil No. 02-1-0260, slip op. at 3 (Haw. Cir. Ct. Jul. 20, 2006); *White* v. *Ford Motor Co.*, CV-N-95-0279-DWH, slip op. at 35-37 (D. Nev. Mar. 14, 2005); *Romo* v. *Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 806 (Cal. Ct. App. 2003).

> Come the lawsuit, however, the [plaintiff] injured by [the product] presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured [by an alternative design] are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by [consumers] (and stockholders) in other states.

Carroll v. *Otis Elevator Co.*, 896 F.2d 210, 216 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (in the jury's mind, a manufacturer's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim").

This hindsight bias is compounded substantially when the plaintiff is able to shine a spotlight on the *ex ante* cost-benefit aspect of the product-design process and argue that, by considering the costs of various design alternatives, including the costs of potential accidents such as that suffered by the plaintiff, the defendant "traded lives for dollars." See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 552 (2000) (mock juror study revealed that even proper corporate balancing of risks against costs incited jurors to award inflated punitive damages awards); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, *supra*, 49 U. CHI. L. REV. at 11. This turns on its head the first principle of product-liability law—that because most products entail some risk of harm, the task of a responsible manufacturer is to

strike a reasonable balance between safety and a host of other considerations, including "marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 88-89 (1985).

As this Court has recognized, appellate review plays a critical role in filtering out these inevitable aspects of juror bias and helping to ensure that punitive awards comport with the requirements of due process. See *Haslip*, 499 U.S. at 21 ("appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"). But when appellate courts evaluating reprehensibility make precisely the same errors that infected the underlying jury verdicts, their "review" does nothing to ameliorate the constitutional violations.

The present case is illustrative. Nominally applying the reprehensibility guidepost, the court below found that "the reprehensibility of Ford's conduct was high, given the catastrophic nature of Mrs. Wilson's injuries, Ford's reckless disregard for the safety of others, the repeated nature of Ford's conduct, and the fact that Ford's acts were intentional." Pet. App. 55a. In other words, the court held that Ford's conduct was at the extreme high end of the reprehensibility spectrum merely because (a) Ford knowingly (*i.e.*, intentionally) mass produced a product that entailed some risk of harm (although the product also was useful and highly desirable to consumers), and (b) an accident involving that product resulted in "catastrophic" injuries.

Of course, that does not distinguish this case from any number of other product-liability cases. Most manufacturers know that their products pose some risk of harm to consumers. And it is inevitable that the use of certain types of products at some point will result in serious injury or death. The

factors identified by the court here as supporting a finding of high reprehensibility—the "intentional" design of a mass-produced product that poses some risk of injury and that caused serious injury—are not indicative of particularly reprehensible conduct, but are simply the same factors that are found in every run-of-the-mine product-liability case.

Thus, to distinguish truly reprehensible conduct by a manufacturer from conduct that, although perhaps deserving punishment, falls lower on the reprehensibility spectrum, a reviewing court must look to other objective criteria that were not among the five factors identified in *State Farm*, but which are far more relevant to the inquiry in this category of cases. In particular, courts should consider whether the product design complied with government safety standards, whether it conformed to industry custom and standards, and whether the manufacturer's design choice was supported by contemporaneous expert analysis regarding the safety features at issue and relevant alternative designs.[6]

These factors, as opposed to those relied upon by the court below, actually serve to distinguish between more and less reprehensible conduct. For example, a manufacturer that knowingly designs and markets a product that fails to meet government safety standards might reasonably be judged to have acted more reprehensibly than a manufacturer whose product met or exceeded all government safety standards but nevertheless caused equally severe injuries to a plaintiff. The latter manufacturer has demonstrated a respect for societal judgments about risk tolerance that the former did not.

[6] As we contended above, if established, compliance with government standards, conformity with industry custom and standards, and the existence of contemporaneous expert support for the design decision should negate punitive liability altogether. But if the Court disagrees—or if the factors point in opposite directions—then these factors should be considered in the reprehensibility analysis, along with remedial efforts and any other factors that may be relevant.

Similarly, a manufacturer that rejects the consensus opinion of relevant experts as to a particular safety feature when designing its product might reasonably be judged to have acted more reprehensibly than a manufacturer that chooses between experts with competing opinions on a particular safety feature. Even if, in retrospect, the latter manufacturer made the wrong choice, its design decision did not display the same disregard for existing learning on safety issues as the decision of the former manufacturer.

Here, the reviewing court refused to take such factors into account, and instead found that Ford's conduct fell on the extreme high end of the reprehensibility spectrum because it entailed the features that are common to all product-liability cases. In so doing, the court effectively created a *per se* rule of extreme reprehensibility for product liability, rendering *BMW*'s reprehensibility guidepost—originally developed in the context of traditional economic torts—impotent to distinguish among more and less reprehensible conduct in the product-liability context.

One aspect of the analysis below is a particularly good illustration of the problem. The court found that Ford's conduct satisfied the fifth reprehensibility factor, "intentional harm," because "Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers." Pet. App. 57a. By equating the product-design process for inherently dangerous products like automobiles with an intention to harm consumers, the court deprived the reprehensibility guidepost of any constraining force in the product-liability context. As one commentator has explained, design defect cases inevitably involve "'conscious design choice[s]' * * * implicat[ing] a manufacturer's decisionmaking process concerning risk-utility"; "[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with 'intent' built in." Aaron D. Twerski, *Punitive Dam-*

ages: Through the Five Prisms, 39 VILL. L. REV. 353, 356 (1994).

When this "built in" intentionality is imported into the reprehensibility analysis, it ensures that any attempt by a manufacturer to "think about risks in a systematic manner and to undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" of all interests (Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 550) will be seen, not as a socially responsible aspect of product design, but as egregious misconduct justifying severe punishment under *BMW*. And far from encouraging an open and thorough consideration of product safety, the resulting punitive awards will deter such socially responsible behavior or at least force manufacturers to limit the scope and transparency of their cost-benefit analysis. See, *e.g.*, Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis*, *supra*, 52 STAN. L. REV. at 1814 ("[T]he perceived likelihood and potential costs associated with punitive damages for performing risk or benefit-cost analyses can be large enough to attract attention by corporate decision makers and deter them from doing such analyses.").

Unfortunately, the court of appeal's simplistic equation of knowledge that a product can cause physical injury or death with high reprehensibility is not unprecedented. On the contrary, manufacturers now face a legal climate in which knowledge that someone could be injured while using a product—a fact common to virtually every product-liability case—creates a very real risk that, when someone inevitably is injured while using the product, the manufacturer will be mulcted with an astronomical punitive exaction for "intentionally" and "repeatedly" selling a product that could cause severe injuries.

The history of Ford Explorer litigation well demonstrates this serious problem. As petitioner indicates (Pet. 7), Ford was exonerated in the first eleven cases to go to judgment on

the claims raised by the respondent, and several juries expressly found that the Explorer was not defectively designed. In this, the twelfth case, a jury, for the first time, concluded that the design of the Explorer was defective and proceeded to impose punitive damages. In finding the conduct to be highly reprehensible merely because the design decision was an intentional one, and then allowing $55 million of punitive damages on top of an only slightly less staggering $27.6 million in compensatory damages, the court of appeal nullified all of Ford's prior victories. This is troubling not only because it is unfair to Ford, but also because it is bound to happen to other manufacturers as well. So long as there is at least one pot of gold at the end of the rainbow, plaintiffs' lawyers will continue to bring punitive-damages claims against manufacturers no matter how many prior exonerations those manufacturers have obtained. *Cf. Philip Morris*, 127 S. Ct. at 1062 (recognizing that "where the amounts [of punitive damages] are sufficiently large," there is a risk of "impos[ing] one State's (or one jury's) policy choice, say as to the conditions under which (or even whether) certain products can be sold, upon neighboring States with different public policies") (internal quotation marks omitted).

Just as "it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance" (*id.* at 1064), so too is it critical for this Court to provide lower courts with clear guidance as to the proper application of the reprehensibility guidepost in the product-liability context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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